

No. 11327

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United States  
Circuit Court of Appeals  
For the Ninth Circuit.

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PAUL A. PORTER, Administrator, Office of Price  
Administration,

Appellant,

vs.

KENNETH W. TROWBRIDGE, doing business  
as Kenneth W. Trowbridge Co., and Precision  
Motor Parts,

Appellee.

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Transcript of Record

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Upon Appeal from the District Court of the United States  
for the Northern District of California,  
Southern Division

JUL 29 1946

PAUL P. O'BRIEN,  
CLERK



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[Clerk's Note: When deemed likely to be of an important nature, errors or doubtful matters appearing in the original certified record are printed literally in italic; and, likewise, cancelled matter appearing in the original certified record is printed and cancelled herein accordingly. When possible, an omission from the text is indicated by printing in italic the two words between which the omission seems to occur.]

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Attorneys for Defendant and Appellee.

In the District Court of the United States  
Northern District of California, Southern Division

No. 23550-S

CHESTER BOWLES, Administrator, Office of  
Price Administration,

Plaintiff,

vs.

KENNETH W. TROWBRIDGE, d.b.a. KEN-  
NETH W. TROWBRIDGE CO., and PRE-  
CISION MOTOR PARTS,

Defendant.

COMPLAINT FOR INJUNCTION  
AND TREBLE DAMAGES

COUNT ONE

1. In the judgment of the Price Administrator, the defendant engaged in actions and practices which constitute a violation of Section 4(a) of the Emergency Price Control Act of 1942 (Pub. Law No. 421, 77th Cong., 2d Sess., Ch. 26, 56 Stat. 23), as amended, hereinafter called "the Act", in that defendant violated Maximum Price Regulation No. 452, as amended, effective in accordance with the provisions of the Act, establishing Manufacturer's Maximum Prices for Automotive Parts. [1\*]

2. Jurisdiction of this action is conferred upon this Court by Sections 205(c) and 205(e) of the Act.

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\* Page numbering appearing at foot of page of original certified Transcript of Record.

3. From and including the second day of September, 1943, there has been in effect, pursuant to the Act, Maximum Price Regulation No. 452, as amended, establishing Manufacturer's Maximum Prices for Automotive Parts.

4. Subsequent to the second day of September, 1943, the defendant, doing business in the City and County of San Francisco, State of California, sold, offered to sell, and continues to sell and offer for sale, as a manufacturer, rebuilt automotive parts at prices in excess of the maximum prices permitted by said Maximum Price Regulation No. 452, as amended.

## COUNT TWO

1. The allegations set forth in paragraphs 1, 2, 3, and 4 of Count One herein are incorporated by reference as if fully set forth.

2. None of the said purchases was made for use or consumption other than in the course of trade or business; the defendant, as a manufacturer, has demanded and received a price or consideration for rebuilt automotive parts sold by him, in excess of the maximum prices established therefor by Maximum Price Regulation No. 452, as amended.

3. Three times the aggregate amount by which the prices received by the defendant in the transactions referred to in paragraph 4 of Count One, and as incorporated in paragraph 1 of this Count, and as referred to in paragraph 2 of this Count exceeds the maximum prices provided by Maximum

Price Regulation No. 452, as amended and revised, equals \$25,077.00.

Wherefore, the Price Administrator demands:

1. A final injunction enjoining the defendant, his agents, servants, employees and attorneys, and all persons in active concert or participation with them, from: [2]

Directly or indirectly selling, delivering, or offering for sale or delivery, as a manufacturer, any rebuilt automotive parts at prices in excess of those established by Maximum Price Regulation No. 452, as amended or revised, or otherwise violating or attempting or agreeing to do anything in violation of said regulation or in violation of any regulation or order adopted pursuant to the Emergency Price Control Act of 1942, as amended or revised, establishing maximum prices for manufacturers of rebuilt automotive parts.

2. Judgment on behalf of the United States of America against the defendant in the sum of \$25,077.00.

3. Such other further and different relief as to the Court may seem just and proper in the premises.

Dated: August 2nd, 1944.

THOMAS C. RYAN,  
GEO. A. FARADAY,  
Attorneys for Plaintiff.

[Endorsed]: Filed Aug. 2, 1944. [3]

[Title of District Court and Cause.]

MOTION TO DISMISS, AND FOR MORE  
DEFINITE STATEMENT OR FOR BILL  
OF PARTICULARS

Now comes the above named defendants and move the above-entitled court as follows:

(a) For an order dismissing the above-entitled action because the complaint fails to state a claim upon which relief can be granted.

(b) For a more definite statement of certain matters contained in said complaint, or in the alternative for a bill of particulars, because such matters are not averred with [4] sufficient definiteness or particularity to enable the defendants properly to prepare their responsive pleading, or to prepare for trial.

Paragraph 1 of Count One alleges that defendants violated the Maximum Price Regulation No. 452 as amended, and Paragraph 4 recites that subsequent to September 2, 1943, defendant "sold, offered to sell, and continues to sell and offer for sale, as a manufacturer, rebuilt automotive parts at prices in excess of the maximum prices permitted by said Maximum Price Regulation No. 452, as amended."

Count Two incorporates, among others, Paragraphs 1 and 4 of Count One. Paragraph 2 of Count Two further alleges that the defendant has demanded and received a price or consideration for rebuilt automotive parts sold by him in excess of

the maximum prices established by Maximum Price Regulation No. 452 as amended, and Paragraph 3 further states that three times the aggregate amount by which the prices received by defendant in the transactions referred to in the complaint exceeds the maximum price provided by Maximum Price Regulation 452 as amended and revised equals \$25,077.

Defendant desires a more definite statement or in the alternative a bill of particulars as follows:

(1) The dates upon which it is claimed that defendants sold, or offered to sell rebuilt automotive parts at prices in excess of the maximum prices permitted by Maximum Price Regulation 452, as amended.

(2) The maximum authorized prices permitted for the rebuilt automotive parts involved.

(3) The prices at which it is claimed defendant sold rebuilt automotive parts.

(4) How the sum of \$25,077 (the amount of the treble [5] damages) is made up.

(5) What kind of rebuilt automotive parts it is claimed defendant sold.

Respectfully submitted,

HAGAR, CROSBY & CROSBY,

Attorneys for Defendants.

GERALD H. HAGAR,  
CARLISLE C. CROSBY,  
PETER J. CROSBY, JR.,  
Of Counsel.

(Here follows memorandum in support of Motion to Dismiss and for More Definite Statement or for Bill of Particulars.)

[Endorsed]: Filed Sept. 21, 1944. [6]

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[Title of District Court and Cause.]

### ANSWER TO COMPLAINT

Comes now the above-named defendant, and answering the alleged Count I in plaintiff's complaint contained, admits, denies and alleges as follows:

#### I.

Alleges that he has no information or belief sufficient to enable him to answer that portion of paragraph 1 of Count I commencing with the first word thereof and ending with the words "the Act," line 27, page 1, of said complaint, and basing his denial upon that ground, denies generally and [7] specifically, each and every, all and singular, the allegations contained in said portion of said paragraph:

Denies generally and specifically, each and every, all and singular, the allegations contained in the remainder of said paragraph.

## II.

Admits the allegations in paragraph 2 of said Count I.

## III.

Admits the allegations contained in paragraph 3 of said Count I.

## IV.

Denies generally and specifically, each and every, all and singular, the allegations contained in paragraph 4 of said Count I.

Wherefore, etc.

Answering the alleged Count II in said complaint contained, this answering defendant admits, denies, and alleges as follows:

## I.

The admissions, denials and allegations set forth in paragraphs I, II, III and IV of this answering defendant's answer to Count I in plaintiff's complaint contained are hereby incorporated by reference as if set forth herein in haec verba.

## II.

Denies generally and specifically, each and every, all and singular, the allegations contained in paragraph 2 of said Count II.

## III.

Denies generally and specifically, each and every, all and singular, the allegations contained in paragraph 3 [8] of said Count II; and further in this

respect, denies that any sales by this defendant exceeded the maximum prices provided by Maximum Price Regulation No. 452 in any sum or amount whatsoever.

Wherefore, this answering defendant prays:

1. That plaintiff take nothing by his complaint on file herein;
2. That this defendant be hence dismissed with his costs;
3. And for such other and further relief as to the Court may seem proper in the premises.

HAGAR, CROSBY & CROSBY,

Attorneys for Defendant.

Of Counsel:

GERALD H. HAGAR,

CARLISLE C. CROSBY,

PETER J. CROSBY, JR. [9]

State of California,  
County of Alameda—ss.

Kenneth W. Trowbridge, being duly sworn, deposes and says:

That he is the defendant in the above entitled action; that he has read the foregoing answer to complaint, knows the contents thereof, and that the same is true of his own knowledge, except as to the

matters therein stated on information or belief, and as to those matters he believes it to be true.

KENNETH W. TROWBRIDGE

Subscribed and sworn to before me this 31st day of October, 1944.

[Seal] RUTH W. GLEERUP,  
Notary Public in and for the County of Alameda,  
State of California.

Receipt of a copy of the within Answer to Complaint acknowledged this 1st day of November, 1944.

GEO. A. FARADAY, ff,  
Attorneys for Plaintiff.

[Endorsed]: Filed Nov. 1, 1944. [10]

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[Title of District Court and Cause.]

INTERROGATORIES TO BE ANSWERED BY  
PLAINTIFF UNDER RULE 33, RULES  
OF CIVIL PROCEDURE AND ANSWERS  
TO INTERROGATORIES PROPOUNDED  
BY DEFENDANT

INTERROGATORY NO. 1

State all dates upon which it is alleged these defendants sold rebuilt automotive parts at prices in excess of those established by Maximum Price Regulation No. 452 as amended.

## INTERROGATORY NO. 2

State all dates upon which it is alleged these defendants offered to sell rebuilt automotive parts at prices in excess of those established by Maximum Price Regulation 452 as amended

ANSWERS TO INTERROGATORIES  
NOS. 1 AND 2

The dates upon which defendant sold and offered to sell rebuilt automotive parts and accessories at Prices in excess of those established by Maximum Price Regulation 452, as amended, are from September 1, 1943, to and including May 31, 1944.

## INTERROGATORY NO. 3

State the name of each person and his address to whom it is alleged these defendants, or any of them, sold rebuilt automotive parts at prices in excess of the maximum prices permitted by said Maximum Price Regulation 452 as amended, the date of each such sale, the article sold to each such person, the unit and gross price for which each article was sold and the number of articles sold to each such person.

## INTERROGATORY NO. 4

State the name of each person and his address to whom it is alleged these defendants, or any of them, offered to sell rebuilt automotive parts at prices in excess of the [11] maximum prices permitted by said Maximum Price Regulation 452 as amended, the date of each such offering, the article offered to each such person, the unit and gross price

for which each article was offered and the number of articles offered for sale to each such person.

### INTERROGATORY NO. 5

How was each such offering made, verbal or in writing? If in writing, attach a copy of each such offering.

### ANSWERS TO INTERROGATORIES NOS. 3, 4 AND 5

Affiant does not have the knowledge or information necessary to answer defendant's Interrogatories No. 3, No. 4 and No. 5. The name and address of each person defendant sold and offered to sell rebuilt automotive parts and accessories at prices in excess of the maximum price permitted by said Maximum Price Regulation 452, as amended, the date of each such sale, the article sold and offered to be sold to each such person, and the unit and gross prices for which each article was sold and offered for sale, and the number of articles sold and offered for sale to each such person, is more peculiarly within the knowledge of defendant. Whether or not each sale or offer to sell was made verbally or in writing is also more peculiarly within the knowledge of defendant. [12]

The amount by which defendant sold rebuilt automotive parts and accessories at prices in excess of the maximum prices permitted by said Maximum Price Regulation 452, as amended, was determined from defendant's Manufacturer's Excise Tax Re-

turns with the Bureau of Internal Revenue at San Francisco, California, for the months of September, 1943; October, 1943; November, 1943; December, 1943; January 1944; February, 1944; March, 1944; April, 1944, and May, 1944. Defendant Kenneth W. Trowbridge, doing business as Precision Motor Parts, is a manufacturer of rebuilt automotive parts and accessories and as such, subject to the Federal Manufacturer's Excise Tax. Prior to September 1, 1943, defendant, Kenneth W. Trowbridge, doing business as Precision Motor Parts, failed and neglected to pay such tax. Defendant in accordance with specific instructions from the Bureau of Internal Revenue, commenced paying said Manufacturer's Excise Tax on all sales of rebuilt automotive parts and accessories beginning September 1, 1943. On September 1, 1943, defendant, doing business as Precision Motor Parts, issued a new price list "6" cancelling price list "5". Said price list set forth [13] prices 5% in excess of previous prices with a reference on the face of the catalog "with Federal Excise Tax included." All sales of rebuilt automotive parts and accessories, from and including the first day of September, 1943, were at a price increase of 5% over prices for sales of rebuilt automotive parts and accessories prior to September 1, 1943. Section 15(a) of Maximum Price Regulation 452, as amended, provides as follows:

"Any tax levied by any statute of the United States . . . which the manufacturer on March 31, 1942, added to the price paid by the pur-

chaser, shall not be included in the maximum price but may be collected by the manufacturer in addition to the maximum price, if such tax is stated separately from the purchase price \* \* \*

Defendant, doing business as Precision Motor Parts, did not add a Manufacturer's Excise Tax to his price on March 31, 1942. Under said Section 15(a) of Maximum Price Regulation 452, as amended, defendant may collect a Manufacturer's Excise Tax in addition to the maximum price only if on March 31, 1942, said tax was added to the ceiling price. Defendant does not satisfy the condition allowing a manufacturer to charge the Manufacturer's Excise Tax to his customers inasmuch as he did not add said Manufacturer's Excise Tax to his price on March 31, 1942. Therefore, all of the Manufacturer's Excise Tax collected by defendant from his customers during the aforesaid period of time, that is, from September 1, 1943, to and including May 31, 1944, were in excess of defendant's maximum price. The amounts of the tax collected are set forth in defendant's Excise Tax Returns filed with the Bureau of Internal Revenue during the aforesaid months. The amounts of tax for each month as set forth on defendant's Excise Tax Returns filed with the Bureau of Internal Revenue in San Francisco, California, are as follows: [14]

September, 1943	\$ 938.81
October, 1943	1060.38
November, 1943	1025.15

December, 1943	1276.25
January, 1944	1062.99
February, 1944	1000.00
March, 1944	1000.00
April, 1944	935.49
May, 1944	59.93
<hr/>	
Total	\$8359.00

All of the Manufacturer's Excise Tax paid by defendant, doing business as Precision Motor Parts, during said months were for sales of rebuilt automotive parts and accessories during said months. All of said amounts set forth in said Excise Tax Returns were collected by defendant, doing business as Precision Motor Parts, from defendant's customers in excess of defendant's maximum price under Maximum Price Regulation 452, as amended.

#### INTERROGATORY NO. 6

What do you claim are the respective maximum prices permitted by Maximum Price Regulation 452, as amended, for each of the rebuilt automotive parts alleged to have been sold by defendants in excess of the maximum prices permitted by said Maximum Price Regulation 452, as amended?

#### ANSWER TO INTERROGATORY NO. 6

Defendant's maximum prices permitted by Maximum Price Regulation 452, as amended, for each of the rebuilt automotive parts sold between September 1, 1943, to and including May 31, 1944,

are the prices charged by defendant to his customers during said period of time less 5% Federal Excise Tax included in price list "6" cancelling price list "5".

#### INTERROGATORY NO. 7

Did you, prior to the filing of the complaint against these defendants, advise any of said defendants of your claim that defendants had charged prices in excess of the maximum prices permitted by said Maximum Price Regulation 452, as amended?

#### ANSWER TO INTERROGATORY NO. 7

Affiant does not have any information or knowledge that Kenneth W. Trowbridge, doing business as Precision Motor Parts, was advised or notified prior to the filing of the complaint in the above entitled matter, that said defendant had charged prices in excess of the maximum prices permitted by said Maximum Price Regulation 452, as amended.

#### INTERROGATORY NO. 8

If the answer to Interrogatory No. 7 is in the affirmative, state by whom, to whom, by what means, oral or written, and if in writing a copy of each such advice.

(NO ANSWER TO INTERROGATORY NO. 8)

(Interrogatories to be answered by Plaintiff under Rule 33 of the Rules of Civil Procedure were

filed Nov. 10, 1944. Answers to Interrogatories Propounded by Defendant were filed Nov. 20, 1945.) [17]

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[Title of District Court and Cause.]

INTERROGATORIES TO BE ANSWERED BY  
DEFENDANT UNDER FEDERAL RULES  
OF CIVIL PROCEDURE

Now comes the above named plaintiff, and serves and files Interrogatories to be answered by defendant as follows:

INTERROGATORY NO. 1

State whether defendant Kenneth W. Trowbridge, doing business as Kenneth W. Trowbridge Co. and Precision Motor Parts, added a Federal Manufacturer's Excise Tax to the price paid by purchasers in sales of rebuilt automotive parts and accessories on March 31, 1942. [18]

INTERROGATORY NO. 2

If the answer to Interrogatory No. 1 is in the affirmative, set forth in each case the following information:

- (a) Date of sale.
- (b) Invoice number.
- (c) Description of items sold.
- (d) Selling price.
- (e) Amount of Federal Manufacturer's Excise Tax paid by purchaser.

(f) Whether or not said tax was stated separately from the purchase price on the invoice.

### INTERROGATORY NO. 3

If the answer to Interrogatory No. 1 is in the negative, state the first date on which a Federal Manufacturer's Excise Tax was added by Kenneth W. Trowbridge, doing business as Kenneth W. Trowbridge Co. and Precision Motor Parts, to the price paid by the purchaser.

### INTERROGATORY NO. 4

State the first date on which a Federal Manufacturer's Excise Tax was paid by Kenneth W. Trowbridge, doing business as Kenneth W. Trowbridge Co. and Precision Motor Parts, to the Bureau of Internal Revenue.

### INTERROGATORY NO. 5

State the amount of Federal Manufacturer's Excise Tax paid by Kenneth W. Trowbridge, doing business as Kenneth W. Trowbridge Co. and Precision Motor Parts, to the Bureau of Internal Revenue for each month commencing on the first day of the first month said Federal Manufacturer's Excise Tax was paid by said Kenneth W. Trowbridge, doing business as Kenneth W. Trowbridge Co. and Precision Motor Parts. [19]

### INTERROGATORY NO. 6

State whether the amounts of Federal Manufacturer's Excise Tax set forth in your answer to In-

terrogatory No. 5 was added on to the prices paid by the customers of Kenneth W. Trowbridge, doing business as Kenneth W. Trowbridge Co. and Precision Motor Parts, commencing September 1, 1943.

### INTERROGATORY NO. 7

State whether any Federal Manufacturer's Excise Tax was added on to the price charged by Kenneth W. Trowbridge, doing business as Kenneth W. Trowbridge Co. and Precision Motor Parts to his customers prior to September 1, 1943.

Dated: January 9, 1945.

/s/ GEORGE A. FARRADAY,

/s/ RALPH GOLUB,

Attorneys for Plaintiff.

[Endorsed]: Filed Jan. 18, 1945. [20]

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[Title of District Court and Cause.]

### OBJECTIONS TO INTERROGATORIES

Defendants object to the interrogatories proposed by the plaintiff upon the ground that they are proposed in violation of the Fifth Amendment to the Constitution of the United States as construed in *Lees v. United States*, 150 U. S. 476, in that the attempt of the plaintiff to compel the defendants to answer the interrogatories is an attempt to compel each of them to be a witness against himself in a suit for a penalty.

/s/ HAGAR, CROSBY & CROSBY,

/s/ GEO. M. NAUS,

Attorneys for Defendants.

## NOTICE

To Messrs. George A. Faraday and Ralph Golub,  
Attorneys for Plaintiff:

Please take notice that the undersigned will bring the above objections on for hearing before the above-entitled court in the Department thereof assigned to District Judge St. Sure, on Monday, the 22nd day of January, 1945, at 10 a.m., or as soon thereafter as counsel can be heard.

/s/ HAGAR, CROSBY & CROSBY,  
/s/ GEO. M. NAUS,  
Attorneys for Defendants.

## MEMORANDUM

The suit is one for a penalty; *Brown v. Cummins Distilleries Corp.*, 56 F. Supp. 941; *Brown v. Glick Bros. Lumber Co.*, 52 F. Supp. 913; *Contra, Bowles v. Berard*, 57 F. Supp. 94.

Ordered: That the foregoing Objections may be calendared for hearing on Monday, January 22, 1945, at 10 a.m.

A. F. ST. SURE,  
United States District Judge.

Receipt of a copy of the foregoing Objections to Interrogatories, this 19th day of January, 1945, is hereby acknowledged.

RALPH GOLUB,  
Attorney for Plaintiff.

[Endorsed]: Filed Jan. 22, 1945. [22]

District Court of the United States  
Northern District of California, Southern Division

At a Stated Term of the Southern Division of the United States District Court for the Northern District of California, held at the Court Room thereof, in the City and County of San Francisco, on Friday, the 6th day of April, in the year of our Lord one thousand nine hundred and forty-five.

Present: the Honorable A. F. St. Sure, District Judge.

[Title of Cause.]

The defendant's objections to plaintiff's proposed interrogatories heretofore having been submitted to the Court for consideration and decision; the same now being fully considered, and the Court having filed its written memorandum opinion and order thereon, it is Ordered, in accordance with said opinion and order, that said objections to interrogatories be and the same are sustained. [23]

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[Title of District Court and Cause.]

MEMORANDUM OPINION AND ORDER SUS-  
TAINING DEFENDANT'S OBJECTIONS  
TO INTERROGATORIES

Plaintiff has proposed written interrogatories to be answered by defendant under Rule 33 FRCP, in an action for injunction and treble damages for alleged violations of section 4(a) of the Emergency Price Control Act (50 USCA App. §904(a).) De-

fendant objects to the interrogatories on the ground that they are proposed in violation of the Fifth Amendment to the United States Constitution, wherein it is provided that "No person \* \* \* shall be compelled in any criminal case to be a witness against himself \* \* \*." An action for a penalty is considered a "criminal case" within the purview of this clause. *Boyd v. U. S.*, 116 U. S. 616; [24] *Lees v. U. S.*, 150 U. S. 476. The question for decision is whether an action for treble damages brought by the Administrator of the Office of Price Administration under section 205(e) of the Act (50 USCA App. §925(e) ), is one for a penalty

The District Court decisions upon this question are in conflict, and the question was left open by the Circuit Court of Appeals of this Circuit in *Glick Bros. Lumber Co. v. Bowles*, No. 10,664, decided January 4, 1945. In that case the Office of Price Administration had examined certain documents belonging to defendants before suing for an injunction and treble damages. The District Court held that the action was one for a penalty, and that defendants were entitled to a dismissal based on their immunity against self-incrimination. The Circuit Court of Appeals reversed the District Court, on the ground that the documents produced for inspection were quasi-public in nature, and that to require the production of such documents would not violate defendants' rights under the Fourth or Fifth Amendment. The Court said, "This is true whether the action be regarded as remedial or penal."

The present situation does not involve the production of documents, but is a direct attempt to compel defendant to testify.

In *Huntington v. Attrill*, 142 U. S. 657, 673, 683, the Supreme Court said that the test of whether a statute is remedial or penal “depends upon the question whether its purpose is to punish an offense against the public justice of the state, or to afford a private remedy to a person injured by the wrongful act. \* \* \* The test is [25] not what name the statute is called by the legislature or the courts of the state in which it was passed, but whether it appears to the tribunal which is called upon to enforce it to be, in its essential character and effect, a punishment of an offense against the public, or a grant of a civil right to a private person.”

Section 925 of 50 USCA App. is entitled “Enforcement,” and provides for fine and imprisonment, suspension of licenses, injunctions, and treble damages, for violations of the Act. Section 925(e), relating to suits for treble damages, limits suits thereunder by private individuals to the ultimate consumer or tenant, each of whom is designated in the Act as the “buyer.” Actions for treble damages may not be brought by one who purchases in the course of trade or business, and the Administrator is empowered in such cases to sue on behalf of the United States. The damages for which he sues are usually based upon an accumulation of sales to a number of customers, and are many times greater than the amount of damages the buyer may ordi-

narily claim. As originally enacted, the statute permitted the buyer to sue within a year of the violation. By amendment of June 30, 1944, the limitation of the buyer's action has been reduced to thirty days after the violation, and at the end of that time the Administrator may sue in the buyer's stead on behalf of the United States, and such suit by the Administrator operates as a bar to any subsequent action by the buyer for damages for the same violation. No notice to the buyer of the Administrator's intention to sue is required by statute, and he may presumably lose his right of action without being aware that such right existed. The relatively [26] short period within which the buyer may exercise his right to damages under this provision indicates that the true purpose of the section is to add in the enforcement of the Act by providing an additional means of punishing offenders, and is not primarily to provide a remedy to private parties who are injured by violations of the Act. This purpose is also shown by the further amendment of section 205(e) which provides that damages shall be only the amount of the overcharge if defendant proves that the violation was neither willful nor the result of failure to take practicable precautions against the occurrence of the violation. Treble damages are assessed, therefore, to punish willfulness or carelessness, rather than to remedy the wrong caused to an individual or sovereign, for the injury would be the same whether the violation were voluntary or involuntary.

In *Bowles v. Berard*, 57 F. Supp. 94, the District

Court of Wisconsin held that both the buyer's and the administrator's actions are remedial suits of a civil nature; that when the Administrator sues on behalf of the United States he represents the public at large, who would be damaged by inflation; and also enables the Government to recoup for damages suffered due to resultant price increases in war-time commodities which it purchases. With regard to the first argument, it may be said that in the prosecution of any public offense the Government sues on behalf of the public at large. Almost any crime or offense which involves money or property affects the national economy, and both the public and the Government in its sovereign capacity benefit directly or indirectly from the punishment of the offender. So far as recoupment by the Government of its own damages caused by inflation is [27] concerned, unless it purchases goods in excess of ceiling prices from the offender himself, I think the violation of the act by an individual has too remote an effect on the price of commodities purchased by the Government to be considered a basis for civil damages.

In *Brown v. Cummins Distilleries*, 56 F. Supp. 941, the District Court of Kentucky held that an action by the Administrator under section 205(e) is one for a penalty. The Court said, "It (a penalty) is essentially different from the idea of damages which is compensation to an injured party for the injury which he has suffered. In a proceeding of this nature the plaintiff has suffered no damages, and the action is not for the purpose of compen-

sation. Regardless of the language in the statutory provision, it is the nature of the provision itself that is controlling. The action is essentially one for the recovery of a penalty.”

In *Miller v. Municipal Court*, 22 C. (2d) 819, the Supreme Court of California held that section 205(e) is a penal provision with respect to suits brought by the buyer as well as by the Administrator.

In *Bowles v. Nasif*, 58 F. Supp. 644, an action by the Administrator for treble damages, the question of whether section 205(e) is remedial or penal is not directly presented, but the court remarks that “This statute, 50 USCA Appendix, §901 et seq., is highly penal in its nature \* \* \*.”

An action for treble damages would not be a bar to a later criminal suit by the United States against the defendant. It cannot be questioned that the defendant in such criminal action would have the privilege of refusing [28] to testify. Yet if the privilege does not extend to the present action, incriminating testimony might be elicited from defendant here which would enable his conviction in a criminal case. If this be so, the protection guaranteed by the Fifth Amendment would be an empty shell. In *U. S. v. Goodner*, 35 F. Supp. 286, the court said, “This provision (against self-incrimination), long regarded as one of the safeguards of civil liberty, should be, and according to the authorities must be, applied in a broad spirit to secure to the citizen immunity from self-accusation,

and applies to all proceedings wherein the defendant is acting as a witness in any investigation that requires him to give testimony that might tend to show him guilty of a crime \* \* \*.”

I conclude that the present action is one for a penalty within the rule set forth in *Huntington v. Attrill*, *supra*. It is therefore

Ordered:

Defendant's objections to plaintiff's proposed interrogatories are sustained.

Dated: April 6, 1945.

A. F. ST. SURE,

United States District Judge.

[Endorsed]: Filed April 6, 1945. [29]

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[Title of District Court and Cause.]

### STIPULATION

It is hereby stipulated and agreed by and between the above-named parties that:

1. On March 31, 1942, the defendant, doing business in the City and County of San Francisco, State of California, sold and offered to sell, as a manufacturer, rebuilt automotive parts. On said date, the Federal Manufacturers' Excise Tax was not added by defendant to the price paid by the purchasers of said rebuilt automotive parts; nor was said tax then considered or included by defendant in his calculation of producing costs as a basis of arriving at his ceiling prices.

2. Subsequent to the 2nd day of September, 1943, and prior to the filing of the Complaint in the above-entitled action on the 2nd day of August, 1944, the defendant, doing business in the City and County of San Francisco, State of [30] California, sold and offered to sell, as a manufacturer, rebuilt automotive parts at ceiling prices, and, in addition, defendant collected, from the purchasers thereof, sums totalling \$8359.00 to cover the Federal Manufacturers' Excise Tax. None of said sales were made for use or consumption other than in the course of the trade or business of the purchasers.

3. This stipulation does not preclude either party from offering, at the time and place of trial of said action, any evidence not in conflict with the facts hereinbefore set forth.

Dated at San Francisco, California, this 21st day of November, 1945.

W. H. BRUNNER and  
RICHARD COBLENTZ,  
By RICHARD COBLENTZ,  
Attorneys for Plaintiff.  
HAGAR, CROSBY & CROSBY,  
By GEO. M. NAUS,  
Attorneys for Defendant.

[Endorsed]: Filed Nov. 21, 1945. [31]

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[Title of District Court and Cause.]

TRIAL MEMORANDUM FOR DEFENDANT

The action is instituted by the Administrator under the Emergency Price Control Act of 1942

(56 Stat. 23; 50 USC §§901-946), which in §205(e), 50 USC 925(e), authorizes him to bring an action "on behalf of the United States" against "any person selling a commodity" who "violates a regulation, order, or price schedule prescribing a maximum price or maximum prices". By the original Act of 1942, §205(e), the action is "for treble the amount by which the consideration exceeded the applicable maximum price"; by the amendment in 1944 the language was changed to "such amount not more than three times the amount of the overcharge, or the overcharges, [32] upon which the action is based as the court in its discretion may determine," with a proviso, "Provided, however, that such amount shall be the amount of the overcharge or overcharges \* \* \* if the defendant proves that the violation of the regulation, order or price schedule in question was neither wilfull nor the result of failure to take practicable precautions against the occurrence of the violation." The amendment added: "and the word 'overcharge' shall mean the amount by which the consideration exceeds the applicable maximum price."

The gravamen of the complaint is that "subsequent to" September 2, 1943, "the defendant \* \* \* sold \* \* \*, as a manufacturer, rebuilt automotive parts at prices" (Count One, par. 4), "a price or consideration" (Count Two, par. 2), "in excess of the maximum prices permitted by \* \* \* Maximum Price Regulation No. 452, as amended" (Manufacturer's Maximum Prices for Automotive Parts); and that "three times the aggregate amount" of

that excess "equals \$25,077.00" (Count Two, par. 3). That amount is a trebling of \$8,359.00.

In his Answers to Interrogatories the plaintiff explains that from and including September, 1943, to and including May, 1944, the defendant filed with the Bureau of Internal Revenue monthly returns of Manufacturer's Excise Tax aggregating that amount of \$8,359.00, and made payment of the tax. The plaintiff says further in his Answers to Interrogatories that that is an excise tax of 5%, and the collection of it by defendant from his customers resulted in collecting a price "in excess of defendant's maximum price under Maximum Price Regulation 452, as amended."

MPR 452, "Manufacturer's Maximum Price for Automotive Parts" was originally issued August 19, 1943, effective September 2, 1943. It "covers all new and rebuilt automotive parts," §1(c), as to which it superseded the General Maximum Price Regulation, §2. It stated, §3, that "on and after September 2, 1943 \* \* \* (a) No manufacturer shall sell or deliver a part at a price higher than the [33] maximum price permitted by this regulation." It "divides sales into two kinds," §5, (a) Sales of parts at list prices, and (b) Sales of parts at non-list prices, and as to the former said:

"(a) Sales of parts at list prices. 'List price' as used in this regulation means the price for a manufacturer's sale of a part which may be derived from a price list or price sheet published and generally distributed to the trade by him. When a

list price is named in this regulation as the maximum price to a purchaser, it means the price adjusted for all applicable extra charges, discounts or allowances for sales to a purchaser of the same class."

By §6 maximum prices were set at the list price in effect on March 31, 1942, for those manufacturers, such as defendant, who had a price list in effect on March 31, 1942;<sup>1</sup> i.e., the technique of price control adopted as to automobile parts was the base period technique.<sup>2</sup> Under the heading, "Miscellaneous," §15 provided:

"Sec. 15. Federal and State taxes. (a) Any

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<sup>1</sup>Subsequently, by Amendment 4, released March 25, 1944, effective March 30, 1944, there was initiated, through addition of new §8a, "a new method for pricing rebuilt automotive parts, other than rebuilt motors." The present litigation embraces the period antedating that new method.

<sup>2</sup>These techniques fall into three general categories:

1. The base period technique provides that the maximum prices on the commodities in question are those charged or asked for in some previous period. \* \* \*

2. The cost-plus pricing technique establishes maximum prices on the basis of current or other cost to the seller, plus some specified margin or mark-up. \* \* \*

3. The specified 'dollars-and-cents' pricing technique establishes a uniform maximum price for all sellers of a particular commodity, or for all sellers in a given category, or for all sellers in a given area. \* \* \* Office of Price Administration, Fourth Quarterly Report, for the period ended January 31, 1943, pp. 33-34.

tax levied by any statute of the United States or statute or ordinance of any state or subdivision thereof which the manufacturer on March 31, 1942, added to the price paid by the purchaser shall not be included in the maximum price if such tax is stated separately from the purchase price, except that such tax need not be stated separately if it is measured by the manufacturer's cost of the part.

(b) Any tax upon the sale or delivery of a part and any compensating use tax upon a part levied by any statute of the United States or statute or ordinance of any state or subdivision thereof and becoming effective on or after March 31, 1942, may also be collected by the manufacturer making such taxable sale or delivery in addition to the maximum price if such tax is stated separately from the purchase price, unless the manufacturer had increased his price on or before March 31, 1942, to reflect such new or increased tax, except that such tax need not be stated separately if it is measured by the manufacturer's cost of the part. \* \* \*

The plaintiff's Answers to Interrogatories disclose that he bases his action upon §15(a) of MPR 452, but the action must fail for any of four reasons:

1. Plaintiff expressly admits in his Answers to Interrogatories that defendant "did not add a Manufacturer's Excise Tax to his price on March 31, 1942." §15(a) is inapplicable as a basis of the action, because it relates only to "any tax \* \* \* which the manufacturer on March 31, 1942, added to the price." It is clear from the Answers to In-

terrogatories that the Bureau of Internal Revenue never collected the excise tax from defendant prior to September 1, 1943, at which time "defendant in accordance with specific instructions from the Bureau of Internal Revenue commenced paying said Manufacturer's Excise Tax on all sales of rebuilt automotive parts and accessories beginning September 1, 1943." Therefore, since §15(a) of MPR 452 is inapplicable, and no other basis of liability is stated or shown, the action must necessarily fail.

2. It is clear that there is a *casus omissus* in §15 of MPR 452, which "is not unusual, particularly in legislation introducing a new system," *U. S. v. Weitzel*, 246 U. S. 533, 543. "A *casus omissus* does not justify judicial legislation," *Ebert v. Poston*, 266 U. S. 546, 554. Subsection (b) of §15 of MPR 452 covers excises levied under any statute "becoming effective on or after March 31, 1942," and therefore does not touch the case at bar. Subsection (a) of §15 extends to a tax or excise levied before March 31, 1942, but only if the manufacturer added it to his price on March 31, 1942. It is clear that §15 of MPR does not reach (i.e., there is a *casus omissus* in) the case of an excise or tax levied before March 31, 1942, but which tax or excise, because of dispute or controversy about it or for any other reason, was not collected or paid and was not added by a manufacturer to his price nor collected from his customers. The very tax or excise at bar has had a stormy history of controversy and litigation. It was levied by §606 of the Revenue Act of 1932, and in an amended form was codi-

fied in 1939 in the Internal Revenue Code, §3403, the relevant portions of which as amended by the Revenue Act of 1941, §544(b), read:

“§3403. There shall be imposed upon the following articles sold by the manufacturer, producer, or importer, a tax equivalent to the following percentages of the price for which so sold:

(a) [Covers automobile truck bodies, chassis, trailers].

(b) [Covers other automobile chassis and bodies, and motorcycles].

(c) Parts or accessories \* \* \* for any of the articles enumerated in subsection (a) or (b), 5 per centum.”

The complaint alleges that we “sold \* \* \* as a manufacturer, rebuilt automotive parts” (Count 1, par. 4; Count 2, par. 2). Shortly after the imposition of the tax by the Act of 1932 the question arose whether one who rebuilt or repaired was a “manufacturer” subject to the tax. In *Skinner v. U. S.*, (1934) 8 F. Supp. 999 (retreading tires), the opinion at page 1003 quotes opinion-letters of the Commissioner of Internal Revenue at different dates in 1932 ruling that “the process of retreading tires by vulcanization is held to be a repair rather than a manufacturing process.” In February, 1933, the Commissioner reversed the ruling. The Court reversed the latter ruling of the Commissioner, saying (8 F. Supp. at 1003, col. 2):

“The court is of the opinion that section 602 of the Revenue Act of 1932 was meant to apply only to newly manufactured tires and that it does not

include retreaded tires, such as are involved in the instant case, and that, in holding that it does include such retreaded tires, the Commissioner of Internal Revenue has exceeded the authority [36] granted him under the act, and that such an interpretation is not a proper interpretation of the act." For seven years after the Act of 1932, the court rulings were against the Commissioner's assertion of taxability. One such, *Armature Exchange, Inc., v. U. S.*, (1939) 28 F. Supp. 10 (reconditioning armatures) listed the rulings as follows (28 F. Supp. at 15, col. 1):

"Instances of repairs or restorations of parts of automobiles, some of the type here involved, others of a different type, which have been declared not to amount to 'manufacturing' are: Retreading tires (*Skinner Tire & Rubber Co. v. United States*, D. C., 1934, 8 F. Supp. 999); rebuilding armatures (*Monteith Bros. Co. v. United States*, D. C., Ind. 1936, 18 American Federal Tax Reports, 1320); rebabbiting connecting rods (*Hemphy-Cooper Mfg. Co. v. United States*, D. C. Mo., 1937; 19 American Federal Tax Reports, 1313; *Bardet v. United States*, D. C. Cal. 1938, *Prentice-Hall Federal Tax Current Court Decisions for 1938*, Par. 5.507); rebuilding generators and armatures (*Becker-Florence Electric Co. v. United States*, D. C. Mo., 1938, *Prentice-Hall Federal Tax Service Current Court Decisions for 1939*, Par. 5.161."

Accord, *Con-Rod Exchange, Inc., v. Hendricksen*, (1939) 28 F. Supp. 924. But in turn, beginning in

December, 1939, there was a series of decisions in Circuit Courts of Appeal ruling in favor of the Commissioner's claim of "manufacture," i.e., taxability: *Clawson & Bals, Inc., v. Harrison*, 7 Cir., 108 F. 2d 991 (connecting rods); *U. S. v. Armature Exchange*, 9 Cir. (1941) 116 F. 2d 969 (re-wound armatures); *U. S. v. Moroloy Bearing Service*, 9 Cir., 124 F. 2d 373 (connecting rods); *U. S. v. J. Leslie Morris Co.*, 9 Cir., 124 F. 2d 371; *U. S. v. Armature Rewinding Co.*, 8 Cir., 124 F. 2d 589 (armatures and generators); *Hendricksen v. Seward*, 9 Cir., 135 F. 2d 986 (res judicata); *Monteith Bros. Co. v. U. S.*, 7 Cir., 142 F. 2d 139. And see *Niagara Motors Corp. v. McGowan*, 45 F. Supp. 346.

The foregoing history of controversy with the Commissioner of Internal Revenue illuminates the following portion of the Administrator's answer 3 to interrogatories:

"Prior to September 1, 1943, defendant, Kenneth W. Trowbridge, doing business as Precision Motor Parts, failed [37] and neglected to pay such tax. Defendant in accordance with specific instructions from the Bureau of Internal Revenue, commenced paying said Manufacturer's Excise Tax on all sales of rebuilt automotive parts and accessories beginning September 1, 1943. On September 1, 1943, defendant, doing business as Precision Motor Parts, issued a new price list '6' cancelling price list '5'. Said price list set forth prices 5% in excess of previous prices with a reference on the face of the catalog 'with Federal Excise Tax included'. All sales of rebuilt automotive parts and accessories,

from and including the first day of September, 1943, were at a price increase of 5% over prices for sales of rebuilt automotive parts and accessories prior to September 1, 1943."

And it equally illuminates the subsequent statement in the course of answer 3, reading:

"Defendant, doing business as Precision Motor Parts, did not add a Manufacturer's Excise Tax to his price on March 31, 1942."

3. A fatal defect in the Administrator's claim is the false premise that the tax in question is a part of the price of goods sold. The tax is something apart from the price; something separate from the price. The Congress has so declared and commanded. In the very Act levying the tax, it is enacted that in "determining the price for which an article is sold \* \* \* there shall be excluded the amount of tax imposed by this title, whether or not stated as a separate charge," Revenue Act of 1932, §619(a), now I.R.C. §3441(a). That language is carried into the text of Regulations 46 (Excise Taxes) §316.8. In the report (H. R. Report No. 708, 77th Cong., First session) of the Committee on Ways and Means on the Revenue Bill of 1932, under the original section numbering of the Bill, it is said:

#### "SECTION 604. SALE PRICE.

"Section 604 provides rules for determining the sale price which is the basis of the tax. In general, this should be the manufacturer's or producer's price at the factory or place of production. \* \* \* The amount of tax under this title is to be excluded.

It is not intended to require the tax to be separately charged. If no separate charge is made, the tax is to be presumed to be included. For example, the invoice may specify the charge for the merchandise as \$100, plus \$2.25 [38] for the manufacturers' tax, or it may simply state the charge as \$102.25 for the merchandise and in either case the manufacturers' tax will be \$2.25. This has been found in Canada to be the most workable plan and the fairest to industry in general."

Therefore, whether or not a manufacturer states the price separately from the tax, the tax is not a part of the price. "If no separate charge is made, the tax is presumed to be included," but that is only a presumption; and the presumption disappears (*Ariasi v. Orient Ins. Co.*, 9 Cir., 50 F. 2d 548) in the face of plaintiff's answer to interrogatories, that "defendant \* \* \* did not add a Manufacturer's Excise Tax to his price on March 31, 1942." In short, the plaintiff Administrator's claim comes down to this: Before September, 1943, defendant did not collect or pay the tax, and he did not add it to his price. By his new price list 6 of September 1, 1943, defendant did not increase his price, but for the first time began to add the tax and collect it from his customers and in turn pay it monthly to the Collector of Internal Revenue. So the Administrator in his answers to interrogatories adds up the taxes collected by defendant from his customers and paid to the Collector month by month, as follows:

"September, 1943	\$ 938.81
October, 1943	1060.38
November, 1943	1025.15
December, 1943	1276.25
January, 1944	1062.99
February, 1944	1000.00
March, 1944	1000.00
April, 1944	935.49
May, 1944	59.93
	<hr/>
Total	\$8359.00'',

and then having finished his tax arithmetic by that adding, turns to multiplying by trebling, and then sues for a price overcharge upon sales at prices that were never increased or overcharged, and seeks to have us pay three times more a tax already paid once. A simple analysis and simple statement of his claim should be enough to turn him out of court.

Even though we did not have the Administrator's answer to [39] interrogatories, that "defendant \* \* \* did not add a \* \* \* tax to his price on March 31, 1942," there would be present only the simple question of fact whether we did or did not add it, and it could be easily proved that we did not. In *Con-Rod Exchange, Inc., v. Hendricksen*, 28 F. Supp. 924, 927, col. 1, it is said:

"The evidence shows that the sales of rebabbitted rods were made at prices fixed by larger competitors who published, regularly, price lists. This was

maintained at all times. Even after the audits made by the agents of the Internal Revenue Department and which resulted in the additional assessment, no change was made to include the additional taxes that might be assessed against them. An executive officer of the plaintiff testified positively that at no time was the price fixed by himself or anyone connected with the company so as to include the tax.

Some of the price lists which the plaintiff sought to meet show that the particular competitor had included the excise tax in the price. There is no showing that plaintiff was aware of that fact. But even if there were, it could not be held to outweigh the positive statements that a possible excise tax was not in contemplation when the price was fixed.

Two merchants may sell the same article at the same price, and yet entirely different elements might enter into the determination of the price. A large dealer, engaged in rebabbitting on a national scale, with a large factory doing the repairing, would have a lower cost, enabling him to absorb the excise tax and still compete with a smaller dealer, like the plaintiff, whose cost of production must be higher and who does not absorb the tax. So the argument from identity of price is of little help."

4. The plaintiff Price Administrator has no jurisdiction over taxes or excises. His jurisdiction is over prices, which is a wholly different subject matter. The grant of jurisdiction to him is in the opening sentence of §2(a) of the Emergency Price Control Act of 1942 (50 USC §902(a) ), and reads:

“Sec. 2. (a) Whenever in the judgment of the Price Administrator (provided for in section 201) the price or prices of a commodity or commodities have risen or threaten to rise to an extent or in a manner inconsistent with the purposes of this Act, he may by regulation or order establish such maximum price or maximum prices as in his judgment will be generally fair and equitable and will effectuate the purposes of this Act.”

Most wisely, the Congress reserved to itself the sole jurisdiction over taxes and excises. [40]

The statutory authority to sue given under the Price Control Act, §205(e) (50 USC §925(e) ), is addressed to an overcharge in price, not to the addition or collection of a tax. The present suit is outside the authority given by the Congress.

[Endorsed]: Filed Dec. 5, 1945. [41]

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[Title of District Court and Cause.]

### ORDER FOR JUDGMENT

Ordered:

The above-entitled action is dismissed, with costs to defendant.

Defendant may submit findings of fact and conclusions of law in accordance with this order.

Dated: December 10, 1945.

A. F. ST. SURE,

United States District Judge.

[Endorsed]: Filed December 10, 1945. [42]

In the District Court of the United States, Northern District of California, Southern Division.

No. 23550-S

CHESTER BOWLES, Administrator, Office of Price Administration,

Plaintiff,

vs.

KENNETH W. TROWBRIDGE, d.b.a. Kenneth W. Trowbridge Co. and Precision Motor Parts,  
Defendant.

### FINDINGS AND JUDGMENT

The Court finds:

1. The Court judicially knows, and therefore finds to be true, the allegations of the first three numbered paragraphs of plaintiff's complaint, with respect to the identity and existence of the statutory and regulatory provisions that confer jurisdiction upon this Court over the subject matter of this suit; but the Court finds to be untrue the allegations inserted in those jurisdictional paragraphs that the defendant violated those statutory and regulatory provisions.

2. On March 31, 1942, the defendant, doing business in the City and County of San Francisco, State of California, [43] sold and offered to sell, as a manufacturer, rebuilt automotive parts. On said date, the Federal Manufacturers' Excise Tax was not added by defendant to the price paid by

the purchasers of said rebuilt automotive parts; nor was said tax then considered or included by defendant in his calculation of producing costs as a basis of arriving at his ceiling prices.

3. Subsequent to the 2nd day of September, 1943, and prior to the filing of the Complaint in the above-entitled action on the 2nd day of August, 1944, the defendant, doing business in the City and County of San Francisco, State of California, sold and offered to sell, as a manufacturer, rebuilt automotive parts at ceiling prices, and, in addition, defendant collected, from the purchasers thereof, sums totalling \$8359.00 to cover the Federal Manufacturers' Excise Tax. None of said sales were made for use or consumption other than in the course of the trade or business of the purchasers.

4. The said tax was levied by section 606 of the Revenue Act of 1932, and in an amended form was codified in 1939 in section 3403(c) of the Internal Revenue Code, but prior to September 1, 1943, the Collector of Internal Revenue made no attempt to collect the said tax from, and it was not paid by, the defendant. On or shortly before September 1, 1943, the Bureau of Internal Revenue specifically instructed the defendant to commence paying said tax on all sales of rebuilt automotive parts and accessories beginning September 1, 1943, which the defendant did in the aggregate of \$8359.00 mentioned in paragraph 3 hereinabove; and the amount of \$25,077.00 mentioned in the second count

of plaintiff's complaint is merely a trebling of said tax aggregate of \$8359.00. [44]

### CONCLUSIONS AND JUDGMENT

1. The Court concludes and adjudges that the plaintiff should take nothing and that the plaintiff's complaint be dismissed, with costs to defendant.

2. The clerk of this court is directed forthwith to enter the judgment by notation thereof in the civil docket pursuant to Rules 58 and 79(a), FRCP.

Dated: January 2, 1946.

A. F. ST. SURE,  
United States District Judge.

Receipt of a copy of the foregoing proposed Findings, Conclusions and Judgment is hereby acknowledged, this 17th day of December, 1945.

W. H. BRUNNER,  
ROBERT LONGENECKER,  
Attorneys for Plaintiff.

[Endorsed]: Filed January 2, 1946. [45]

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[Title of District Court and Cause.]

### NOTICE OF APPEAL TO CIRCUIT COURT OF APPEALS

Notice Is Hereby Given that Plaintiff Chester Bowles, Administrator, Office of Price Administration, hereby appeals to the Circuit Court of Ap-

peals for the Ninth Circuit, from the Final Judgment entered in this action on January 2, 1946.

/s/ W. H. BRUNNER,

/s/ RALPH GOLUB,

Attorneys for Plaintiff.

[Endorsed]: Filed February 27, 1946. [46]

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[Title of District Court and Cause.]

DESIGNATION OF CONTENTS OF RECORD  
ON APPEAL

It is hereby designated by the appellant that the following portions of the record, proceeding and evidence be contained in the Record on Appeal:

1. Complaint
2. Answer
3. Stipulation
4. Findings of Fact and Conclusions of Law and Judgment
5. Order for Judgment
6. Interrogatories
7. Answer to Interrogatories
8. Memorandum Opinion and Order
9. Objections to Interrogatories
10. Motion to Dismiss
11. Transcript of proceedings on trial [47]

12. Notice of Appeal

13. This designation of contents of record on appeal.

/s/ W. H. BRUNNER,

/s/ RALPH GOLUB,

Attorneys for the Plaintiff.

[Endorsed]: Filed February 27, 1946. [48]

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[Title of District Court and Cause.]

COUNTER-DESIGNATION OF ADDITIONAL  
PORTIONS OF THE RECORD ON APPEAL

Pursuant to Rule 75(a) FRCP, the defendant designates the following additional portions of the record, proceedings, and evidence, to be included:

1. The page or pages of the clerk's docket relating to this case.

2. Trial memorandum for defendant.

/s/ GEO. M. NAUS.

/s/ HAGAR, CROSBY & CROSBY,

Attorneys for Defendant.

Receipt of a copy of the foregoing Counter-Designation is hereby acknowledged, this 5th day of March, 1946.

RALPH GOLUB, Atty.,

Attorneys for Plaintiff.

[Endorsed]: Filed March 5, 1946. [49]

[Title of District Court and Cause.]

ORDER EXTENDING TIME TO DOCKET

Good cause appearing therefor, it is hereby Ordered that the Appellant herein may have to and including May 18, 1946, to file the Record on Appeal in the United States Circuit Court of Appeals in and for the Ninth Circuit.

Dated: April 8, 1946.

A. F. ST. SURE,  
United States District Judge.

[Endorsed]: Filed April 8, 1946. [50]

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DOCKET ENTRIES

1944

Aug. 2 Filed complt iss summons  
Aug. 8 Filed summons ret. ex. 8-3-44  
Aug. 22 Filed stip. ex. time of deft to plead to  
Sept 6  
Sept. 21 Filed mos to dis etc. Mailed no.  
Oct. 9 Ord deft's mo for more def state etc De-  
nied & deft have 10 days to ans  
Nov. 1 Filed ans Mailed no  
Nov. 10 Filed interrogs to be answered by plttf  
Nov. 13 Ord set for trial Jan 25, 1945

1945

Jan. 8 Ord con Mar 15 for trial  
Jan. 18 Filed Interrogatories to be answered by  
deflt under F.R.C.P.

1945

- Jan. 22 Filed deft's objections to Interrogatories  
Objections to Interrog. sub. briefs 10-10-10
- Jan. 24 Filed Brief—objections to Interrogatories
- Feb. 3 Filed brief of Plain
- Feb. 7 Filed Reply Memo of defts
- Feb. 8 Or. objections to interrog. submitted
- Mar. 5 Filed praecipe iss subpoena
- Mar. 7 Filed subpoena ret ex-V. B. Guerra
- Mar. 15 Ord con May 22 for trial
- Apr. 6 Ord defts objetns to proposed interrogs  
sustained  
Mailed copies of order  
Filed memo opinion
- May 28 Or. trial con't to August 16, 1945
- Aug. 16 Or. con'd to Oct 2, pretrial Conf
- Oct. 2 Pre-Trial Conf., cont Nov 20 for trial
- Nov. 20 Ord con Dec 4 for trial  
Filed ans to interrogs propounded by deft
- Nov. 21 Filed stip re adding Mfgs excise tax
- Dec. 4 Ord con Dec 5 for trial
- Dec. 5 Trial before the Ct sitting without a jury,  
submitted  
Filed deft's trial memo
- Dec. 10 Ord case dismissed with costs to deft on  
findgs to be filed Mailed no  
Filed ord for judgt [51]
- Dec. 17 Lodged findgs

1946

- Jan. 2 Filed findg. Judgt; "that the plaintiff should take nothing and that the plaintiff's complaint be dismissed with costs to defendant."
- Feb. 27 Filed mo of appeal Mailed mo  
Filed designation  
Filed aff't of ser
- Mar. 5 Filed counter designation
- Apr. 8 Filed ord ex time docket appeal

[Endorsed]: Filed April 8, 1946. [52]

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District Court of the United States  
Northern District of California

CERTIFICATE OF CLERK TO TRANSCRIPT  
OF RECORD ON APPEAL

I, C. W. Calbreath, Clerk of the District Court of the United States, for the Northern District of California, do hereby certify that the foregoing 52 pages, numbered from 1 to 52, inclusive, contain a full, true, and correct transcript of the records and proceedings in the case of Chester Bowles, etc., Plaintiff, vs. Kenneth W. Trowbridge, etc., Defendant, No. 23550-S, as the same now remain on file and of record in my office.

I further certify that the cost of preparing and certifying the foregoing transcript of record on appeal is the sum of \$14.80, and that the said amount

has been charged against the United States of America.

In Witness Whereof, I have hereunto set my hand and affixed the seal of said District Court at San Francisco, California, this 15th day of May, A. D. 1946.

[Seal] C. W. CALBREATH,  
Clerk.

By /s/ E. VAN BUREN,  
Deputy Clerk. [53]

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[Endorsed]: No. 11327. United States Circuit Court of Appeals for the Ninth Circuit. Paul A. Porter, Administrator, Office of Price Administration, Appellant, vs. Kenneth W. Trowbridge, doing business as Kenneth W. Trowbridge Co., and Precision Motor Parts, Appellee. Transcript of Record. Upon Appeal from the District Court of the United States for the Northern District of California, Southern Division.

Filed: May 17, 1946.

/s/ PAUL P. O'BRIEN,  
Clerk of the United States Circuit Court of Appeals for the Ninth Circuit.

In the Circuit Court of Appeals of the United  
States in and for the Ninth Circuit

No. 11,327

PAUL A. PORTER, Administrator, Office of Price  
Administration,

Appellant,

vs.

KENNETH W. TROWBRIDGE, d.b.a. Kenneth  
W. Trowbridge Co., and Precision Motor Parts,  
Appellee.

### STATEMENT OF POINTS

On the appeal taken in the above-entitled action, the appellant, Paul A. Porter, Administrator of the Office of Price Administration, will urge and rely upon the following points:

1. The Court erred in sustaining appellee's general objection to all of appellant's interrogatories, whether incriminating or not, upon the ground that to require the appellee to answer the proposed interrogatories would compel the appellee to testify against himself in a criminal case in violation of the fifth amendment to the constitution.

2. The Court erred in concluding as a matter of law that the appellee was entitled under the provisions of Maximum Price Regulation No. 452, as amended, to collect from purchasers of rebuilt automotive parts manufactured and sold by appellee as alleged in the complaint the sum of \$8,359.00 to

cover the Federal manufacturers' excise tax in addition to the ceiling prices of the said rebuilt automotive parts.

3. The court erred in concluding and adjudging that the appellant should take nothing and that the appellant's complaint should be dismissed.

4. The Court erred in failing to award injunctive relief and treble damages as demanded in the complaint herein.

/s/ HERBERT H. BENT,

Regional Litigation Attorney.

/s/ W. H. BRUNNER,

District Enforcement Attorney.  
Attorneys for the Appellant.

[Endorsed]: Filed June 13, 1946. Paul P. O'Brien, Clerk.

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[Title of Circuit Court of Appeals and Cause.]

DESIGNATION OF CONTENTS OF RECORD  
ON APPEAL

Appellant herein designates the following portions of the record, proceedings, and evidence to be contained in the printed record on appeal herein:

1. Entire record of said cause of action.

2. This designation of contents of record on appeal.

/s/ HERBERT H. BENT,

Regional Litigation Attorney.

/s/ W. H. BRUNNER,

District Enforcement Attorney.  
Attorneys for the Appellant.

[Endorsed] Filed June 13, 1946. Paul P.  
O'Brien, Clerk.

